IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

First Appeal No. 577 of 1989

Sudam Jagan Pakhare ..Appellant

vs.

1. Jagain Krishna Pakhare
2. Dattatraya Jagan Pakhare
3. Bajirao Jagan Pakhare
4. Deshraj alias Balu Jagan Pakhare
5. Harischandraq Jagan Pakhare
6(a) Mrs.Indu Shinde C/o Mr.Shinde
6(b) Mrs.Sindhu Bhosale C/o Dr.V.Bhosale.
6(c) Mrs.Sushila Shinde C/o Dr.Shinde
6(d) Mr.Suresh Tatyaba Karande M.A.C/o S.K.Mane
6(e) Smt.Lalita Vasant Karande
6(f) Mr.Ulhas Tatyaba Karande
6(g) Mr.Kumar Tatyaba Karande
6(h) Mr.Sanjay Tatyaba Karande
7. Dayanu Hari Karande
8. Kakasaheb Baburao Karande
9.Maruti Baburao Karande
10.Waman Baburao Karande ..Respondents

Shri M.K.Nesari for appellant.
Shri R.S.Dhaygude with Shri S.P.Thorat for respondent nos.8 to 10

CORAM: S.B.MHASE J.
25th August,2006

ORAL JUDGMENT:

1. Heard the learned Counsel.

2. This appeal is directed against the judgment and decree passed in S.C.suit No.2275 of 1972 by the City Civil Court at Mumbai on 29th June, 1988. It was a suit to declare that the plaintiff/appellant is the partner along with the

defendants/respondents in the business carried on by the plaintiff/appellant and the defendants/respondents in different names as referred to in Schedule A to the plaint and for further declaration that the plaintiff is entitled to 1/12th share in the profit earned by the said partnership firm from the year 1948 and in all assets and properties of the partnership including the goodwill, machinery and other articles and tenancy rights in the premises and shops where the partnership is carrying on business and other properties and movable and immovables of the partnership as mentioned in the schedule. It is further prayed that the said partnership be dissolved with effect from 26th January, 1970 and/or from any other date as is found suitable to the Court. Further the accounts of partnership business be made. There are other prayers which need not require any mention here. Even though the suit is filed in the year 1972 it appears that after promulgamation of Benami Transactions (Prohibition of the right to recover property) Ordinance, 1988 was brought into force the preliminary issue no.2(a) was framed to the effect that the suit filed by the plaintiff/appellant is barred by the provisions of the said Ordinance. Since according to the respondents plaint makes out

a case that real owner of all the properties is the partnership between the two joint families of Karande and Pakhare and ostensible names in which the business is run and the properties are held are not the real owners of the said properties. Therefore, it is contended that by this suit the plaintiff/appellant is trying to recover by his claim by enforcing his right in the suit properties which are held benami by different persons. Such claim, according to the respondents, was prohibited.

3. This Court need not go into the merits of the case at this stage. Assuming for a moment that there is a case claiming benami transaction, the question is whether such defence is available to the original defendants/respondents.

4. It is admitted fact that the suit has been filed in the year 1972. At that time the benami transactions (Prohibition of the right to recover property) Ordinance, 1988 was not in force. There was no other provision which is similar to that ordinance which was in force on the date of presentation of the suit. The said ordinance has further culminated into legislation being Benami Transactions (Prohibition) Act, 1988. In the said

Act section 4 is relevant for our consideration. Section 4 reads as under:

> "4. Prohibition of the right to recover property held benami: (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie or on behalf of a person claiming to be the real owner of such property.
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> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property;
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> (3) Nothing in this section shall apply:
>
> (a) where the person in whose name the property is held is a coparcener in a Hindu undividied family and the property is held for the benefit of the coparceners in the family; or

> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

Thus on reading sub-section (1) it will be evident that no suit, claim or action to enforce any right in respect of any property held as benami can be concluded by the real owner of the property as against the benamidar. Save and except sub-section (2) provides that no defence can be raised by the defendant in respect of the property which is held as benami property. However, sub-section (3) carved out the exception and states that sub-sections (1) and (2) will not apply where the person in whose name the property is held i.e. ostensible owner is a coparcener in Hindu Undivided Family and the property is held for the benefit of the coparcerner in the family or where the person in whose name the property is held i.e. benamidar is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

Therefore, taking recourse of the provisions of sub-section (1) of section 4 as is reflected from the said ordinance the City Civil Court has concluded that the suit is barred. It appears that these provisions were initially considered in the matter of **Mathilesh Kumari and another Vs. Prem Behari Khare** reported in A.I.R.1989 S.C.1247 wherein interpreting these provisions it is held that the Act is retrospective in operation. Therefore, on the basis of this judgment it can be said that the judgment of the City Civil Court is proper one. However, a further reference is made to the judgment in the matter of **R.Rajagopal Reddy (dead) by L.Rs. and others Vs.Padmini Chandrasekharan (dead) by L.Rs. reported in AIR 1996 S.C.238** wherein the 3 Judges Bench of the Supreme Court has ruled down the decision rendered by 2 Judges Bench of the Supreme Court in A.I.R.1989 S.C.1247 and it has been observed as under:

> "Section 4(1) of the Act cannot be applied to the suit, claim or action to enforce any right in property held benami against person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person

claiming to be real owner thereof, prior to the coming into force of Section 4(1) of Act. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself, suggests that a new liability or restriction imposed by Section 4(2) on a pre-existing right and such a provision cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit,

> claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19.5.1988, if before the stage of filing of defence by the real owner is reached. Section 4(2) becomes operative from 19th May, 1988 then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights or real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof.

Thus on going through these two judgments it is now established that the Act is prospective and the defence to the suit raised by the parties prior to coming into force the said Act is not affected by the ordinance and thereafter by the provisions of the said Act. Therefore, the judgment as delivered by the City Civil Court is not just and proper and requires to be set aside. There is one more reason

for which the judgment requires to be set aside is that on reading the plaint it will appear that though initially it was a self acquired property of two persons, one from Pakhare family and one from Karande family, after their death it has become the property of the respective branch. In the said branch there were major and minor coparcerners. Alongwith major and minor heirs equally there were fiduciary heirs. Therefore, it is most likely that sub-section (3) is applicable in such a situation and bar which has been contemplated under sub-sections (1) and (2) is not applicable. This aspect has not been considered by the City Civil Court and, therefore, the order is bad. The third reason to set aside this judgment is that the City Civil Court committed an error in treating this issue as a preliminary issue. On going through the pleadings of the parties it requires to be considered as to what was the nature of the property after the death of main propositors from Parkhe and Karande families, who are the subsequent persons holding the joint family properties in common or as coparcerners and/or as a separate heir. It is further required to be considered whether the minor’s property is being possessed of by the major member of the family in fiduciary capacity or not and this cannot be done unless

evidence is recorded and finding of fact is arrived at. Therefore, the question of application or non application of the said ordinance and/or thereafter the Act was not simplicitor pure question of law but it was a mixed question of law and fact and, therefore, the City Civil Court committed an error in treating issue no.2(a) as a preliminary issue and dismissing the suit. Viewed from any angle the order passed by the City Civil Court is bad and illegal and requires to be set aside. In the result appeal is allowed. The order passed on the preliminary issue is hereby quashed and set aside. The suit is restored to its original position. City Civil Court is hereby directed to dispose of the suit on merits within a period of one year from the date of receipt of the order in the City Civil Court. In the facts and circumstances of the case there will no order as to costs.

(S.B.MHASE J.)